In the
Supreme Court of the United States
OCTOBER TERM, 1960

No. [redacted]

CLEO E. LOVETT,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER

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REPORTS OF OPINIONS BELOW

The District Court entered judgment and imposed sentence but did not hand down an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. That opinion appears herein, however, at Appendix "A", Page 24.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed and the time of its entry is March 17, 1961.

2. Petition for rehearing was filed on April 12, 1961, and order denying the same was entered on April 25, 1961, without an opinion.

3. The statutory provision conferring jurisdiction on this court to review the opinion and judgment in question is set forth in 28 U.S.C.A. 1254, which provides in part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree;"

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the ruling in the case of *Holland v. United States*, 348 *U. S.* 121, 99 *L.Ed.* 150, 75 *S. Ct.* 127, that a charge to the jury that circumstantial evidence must be consistent

with guilt and inconsistent with innocence should not be given, should be limited to "net worth" tax prosecutions in the nature of the *Holland* case; and therefore whether the court below erred in affirming the failure to give such a charge in this case which is not a "net worth" tax prosecution but rather a case involving criminal conspiracy.

(2) Whether or not counsel for petitioner complied with Rule 30 of the Federal Rules of Criminal Procedure in his request that the general charge on circumstantial evidence be given by the trial judge (R. 733-735, 740-742).

(3) Whether or not the trial court's refusal to charge as requested on the issue of circumstantial evidence was such a patent error of law as would warrant the review of such ruling under the Provisions of Rule 52(b) of the Federal Rules of Criminal Procedure.

STATUTORY PROVISIONS AND SUPREME COURT RULE INVOLVED

The statutes involved are:

Federal Rules of Criminal Procedure, 30 and 52(b), 18 U. S. C. A., Appendix "B" Page 28.

The Supreme Court Rule involved is:

Supreme Court of the United States Revised Rules effective July 1, 1954, Rule 19, Considerations Governing Review on Certiorari, Sub-Paragraph 1(b) reading in part as follows: "Where a Court of Appeals . . . has decided an important

question of Federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this court, or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

STATEMENT OF THE CASE

The Petitioner Cleo E. Lovett was indicted by the Grand Jury on the 19th day of February, 1960. The indictment charged that Petitioner, with divers other persons, did conspire to violate sections, 5601, 5606, 5008(b), 5632 and 7206(f), Title 26, Internal Revenue Code. (R. 2)

The cause came on for trial May 10th, 1960, in the District Court of the United States for the Middle District of Alabama, Southern Division, before the Honorable Frank M. Johnson, Jr., District Judge. (R. 7). The Petitioner and his alleged co-conspirators, with whom he was tried, entered pleas of not guilty. (R. 8-18).

During the course of the trial, The Government sought to establish certain facts through the testimony of numerous witnesses and the introduction of certain other evidence. By and large the testimony against the Petitioner was circumstantial although there was some direct evidence offered through the testimony of one Robert Dale Nettles, an alleged accomplice. Mr. Nettles testified that from February until June he worked with the Defendant Wood and others in the operation of an illegal whiskey still in or near Dothan, Ala-

bama, and in or near Bainbridge, Georgia. This witness testified that he was hired by Defendant Wood to help in the alleged moonshine operation (R. 42), that he was taken by the Defendant Wood to the site of a still on the farm of Cleo Madison (R. 47) and that arrangements had been made with Cleo Madison by the Defendant Wood to keep the illegal still on his property. (R. 47). Witness Nettles' testimony was further to the effect that he had in fact operated a still at the orders of Kenneth Wood (R. 74) and had further transported whiskey to a secret cache at the instigation of Kenneth Wood (R. 74) and that he had contacted Petitioner Wilbur Reeves to inform Reeves that the whiskey had been deposited in the cache. (R. 71-76). Witness Nettles further testified that Wood purchased sugar for the still operations from one Tyree Murdock (R. 96-100) and that after the still located at Cleo Madison's was raided in April of 1959 that he and Wood and Petitioner Cleo Lovett with divers other persons set up another still near Bainbridge, Georgia (R. 111) and that arrangements were made by Wood to put the still on or near the land of Petitioner Cleo Lovett (113-115) and that he overhead conversations between Wood and Petitioner Cleo Lovett concerning the operation of the still (R. 115-125) and that he continued to operate the still and to transport non-tax paid whiskey at the orders of Wood. (R. 114).

The other witnesses called by the Government testified largely as to circumstantial evidence which, if believed, would tend to connect the Petitioner and the other Defendants to the alleged conspiracy. A. B. Reynolds gave testimony concerning a certain electric meter and the bills for electricity relating thereto, said meter being located near the property of Petitioner Cleo Lovett in Bainbridge, Georgia. (R. 220-228). Special investigator for the Alcohol and Tobacco Tax Division Behen testified that he had visited an abandoned

still site near Bainbridge, Georgia (R. 230-237) and further testified as to certain conversation he had had with Wood concerning certain vehicles. (R. 241).

Three witnesses gave testimony concerning certain property that had been rented by Raymond F. Garcia to a Mrs. Bowen (R. 249-263), and that the land belonged to one Frank L. Walden who in turn testified that he had seen certain trucks and other vehicles near the property during the time of the alleged conspiracy. (R. 263-266). Witness Charlie McCallister also testified that he saw certain vehicles near the Walden property. (R. 266-270). The description of the vehicles given by witnesses Walden and McCallister corresponded in part to descriptions of vehicles given by Witness Nettles. (R. 82, 95, 99).

Then five witnesses gave testimony concerning certain telephones and long distance calls charged to those numbers. Such was the effect of the testimony of Frances McKay (R. 270-280), Ira Allen (R. 282-297; R. 368-380), Vascal S. Martin (R. 297-320), Lawrence D. Bowen (R. 320-341) and John S. Ford (R. 431-435).

The next group of witnesses called by the Government were law enforcement officers who gave testimony that they had either participated in raids on certain stills or had visited still sites after they had been raided. Such was the testimony of Raymond F. Branch (R. 354-356) and H. G. Ferguson. Witness Ferguson was able to identify one of the defendants in this cause, Carlos Adkins, as one of the persons who had been at the still site in Huston County, Alabama, when it was raided on April 12, 1959. (R. 382). George Tunlin II testified that he participated in a raid on a whiskey still near Bainbridge, Georgia (R. 471), as did Charles G. Covington

(R. 482), at which Robert Keel and Carlos Adkins were arrested. (R. 484). Similar testimony concerning the still in Bainbridge, Georgia, and another still located in Wakulla County, Florida, by Daniel J. Hancock (R. 511), Kenneth R. Garrett (R. 539), Donald E. Perry (R. 547), Homer Hathcock (R. 550), Lofton Clover, (R. 563) and A. E. White (R. 580). The testimony of these officers is entirely circumstantial insofar as showing any connection between those raids and the Petitioner.

At the close of all of the Government's evidence, the Petitioner made a motion for a judgment of acquittal (R. 589) which motion was denied by the trial judge. (R. 595).

The case as presented by the defense tended to show that the various defendants had no connection with the alleged still operation. Witness Archie D. Carmichael testified that he lived near Geo Madison and that the first he knew of such an operation was when he read it in the paper (R. 448). John A. Rudd, a Municipal Judge from Tallahassee, Florida, testified that the Government's witness Robert Dale Nettles' reputation for truth and veracity was bad (R. 466). J. T. Haire's testimony was to the effect that on the 29th of September, 1959, one of the principal dates in this trial, the Defendant Wood was in jail in Attapulgus, Georgia. (R. 598-603). The testimony of Robert Hardwick was to the effect that the automobile allegedly used by Kenneth Wood in February, 1959 was not purchased or delivered to Defendant Wood until March 1959. (R. 604-610). Witness A. L. Ward testified that he lived within 400 yards of the still allegedly operated by the defendants in Bainbridge and that he knew nothing of the operations of the still until the day after it was raided. (R. 618). Winfield Williams, a person alleged to have been

connected with the defendants in the illegal still operation gave testimony that he had never worked for Kenneth Wood. (R. 650).

On June 9th, 1960, the jury returned a verdict of guilty against the Petitioner and every other defendant in the cause.

JURISDICTION IN COURT OF FIRST INSTANCE

The basis for federal jurisdiction in the District Court is provided by Title 18, United States Code, 3231, which provides in part: "The District Courts of the United States shall have original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the United States." The indictment charged a conspiracy to violate sections, 5601, 5606, 5008(b), 5632 and 7206(f), Title 26, Internal Revenue Code. (R. 2).

ARGUMENT

POINT ONE

THE PERTINENT PROVISIONS OF RULE 19, OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES APPLICABLE IN THE CASE BEFORE THIS HONORABLE COURT ARE: THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT; THE TRIAL COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND THE COURT OF

APPEALS HAS SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. IT IS THE LAW IN THE COURTS OF THE UNITED STATES THAT IN ORDER TO RENDER A VERDICT OF GUILTY IN CIRCUMSTANTIAL EVIDENCE CASES, THE JURY MUST REASONABLY CONCLUDE THAT THE EVIDENCE EXCLUDES EVERY REASONABLE HYPOTHESIS EXCEPT THAT OF GUILT.

The rule of law to be applied by the judge when he sits as the trier of fact or to be applied by the judge in order to determine whether or not evidence is sufficient to go to the jury was clearly stated in *Cuthbert v. United States*, 278 F. 2d 220 (5th Cir. 1960):

> ". . . We cannot and do not agree however that in arriving at a decision that, as a matter of law, evidence is sufficient to take the case to the jury, it is not necessary that the evidence can reasonably be found to be consistent with the conclusion of guilt and wholly inconsistent with every other reasonable conclusion. On the contrary, we are of the clear opinion that in a case where the evidence relied on to establish guilt is entirely circumstantial, it is essential to a just decision by the district judge that the evidence makes out a fact case for the decision of the *jury, that the jury might reasonably find not only that the evidence is consistent with a finding of guilt but that it is not consistent with any other reasonable conclusion.* (emphasis ours) *Cuthbert*, supra, page 224.

Once the test of the evidence, as a matter of law, is made and it is found to be sufficient for submission to the jury, it is then incumbent upon the judge to charge the jury as to the law. Since the law states that the jury must be able to find that the evidence is consistent with guilt and inconsistent with any other reasonable conclusion in order to render a verdict of guilty, the judge should so instruct them. To allow the jury to try the facts without the benefit of such an instruction is to make the rule of law a hollow shell. It is not enough that the judge is of the opinion that the jury could reasonably reach such a conclusion, but the jury must in fact reach such a conclusion before finding guilt. To allow the judge to rule as a matter of law that the case is sufficient to go to the jury because he feels that the jury could reasonably reach such a conclusion and then to fail to charge the jury that they must reach the conclusion, in effect substitutes the judge as the trier of fact, thereby invading the province of the jury.

The rule requiring such a charge to the jury has long been recognized by the Court below. The general instruction which has been approved by that court as satisfying the requirement was set forth in *Stutz v. United States*, 47 F. 2d 1029 (5th Cir. 1931), a circumstantial evidence case involving a violation of the National Prohibition Act:

> ". . . Only two of the assignments of error require special notice, both relating to the charge of the court. An instruction was duly requested in these words: 'The Court charges you that before you can convict on circumstantial evidence the circumstantial evidence must be consistent with the guilt of the defendant upon trial and inconsistent with his innocence, and the evidence must be so strong, clear and conclusive as to the guilt of the defendant as to remove every other

> reasonable hypothesis except the defendant's guilt.' This was a correct statement of the law, and pertinent to the case. 16 C. J. Sec. 1568; Chass v. United States (C.C.A.) 258 F. 911. The only charge given in respect to circumstantial evidence was this: 'There are cases where the testimony is positive and direct. There are other cases where the testimony is indirect, circumstantial, as we call it, but the law recognizes that circumstantial evidence is just as valuable evidence in determining a case as is direct testimony, excepting where the testimony is circumstantial you should exercise more care. You should carry along with it of course, the legal idea that the defendant is innocent until he is proven guilty, but from circumstantial evidence you may draw just as strong a conclusion as you may draw a conclusion of innocence.' This charge is not the equivalent of that refused, nor even of the same tendency, and did not cure the erroneous refusal." *Stutz*, supra, page 1030.

Thus a refusal to give the circumstantial evidence charge as requested is erroneous and reversible error. It would appear that, barring any change in the general rule as to submitting circumstantial cases of a criminal nature to a federal petit jury, the charge requested by counsel for petitioner in this case (R. 733-735, 740-742) should have been given to the jury. The only remaining question is whether or not the Decision in *Holland v. United States*, 348 U.S. 121, 99 L. Ed. 150, 75 S. Ct. 127 (1954), changed the general rule or merely carved out a narrowly defined exception.

B. THE DECISION IN HOLLAND V. UNITED STATES AS TO THE NECESSITY OF CHARGING THE JURY ON CIRCUMSTANTIAL EVIDENCE IS, BY ITS OWN

LANGUAGE, LIMITED TO THE PECULIAR CIRCUMSTANCES OF A "NET WORTH" TAX PROSECUTION.

It is the contention of the petitioner that the rule set down in *Holland v. United States*, supra, should be limited to the facts upon which that prosecution and upon which similar "net worth" tax prosecutions are founded. Petitioner further submits that it was the intention of this Honorable Court to so limit that decision. This Court's decision in the *Holland* case arose from an awareness that "net worth" tax prosecutions are an unusual and highly complex breed of cases which utilize circumstantial evidence in a type of situation which renders any other form of proof almost impossible to obtain. This Court took notice of this peculiarity when it said:

> ". . . One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy." *Holland*, supra, 348, U. S. at 126.

Thus it was realized that the evidence which could explain the source of the taxpayer's net worth was peculiarly within the realm of the knowledge of the taxpayer himself. It was further noted that there were an infinite number of possible sources of funds to which one could attribute the taxpayer's net worth. Therefore, in such a case, if the jury were instructed that the evidence must be consistent with guilt and inconsistent with any hypothesis of innocence before they could convict, there would be an insurmountable burden of proof placed on the prosecution to negative every other possible source of funds which could have resulted in the taxpayer's net worth.

These differences from an ordinary criminal case were emphasized by the court and it was on that basis that the traditional safeguards were abandoned. It is clear, however, from the language used by the court that the abandonment of the general rule was only for the purpose of "net worth" prosecutions.

> ". . . We concluded that the method [net worth theory] involved something more than the ordinary use of circumstantial evidence in the usual criminal case. Its bearing, therefore, on the safeguards traditionally provided in the administration of criminal justice called for a consideration of the entire theory." *Holland*, supra, 348 U. S. at 124.

It is to be noted that the court conceded that the circumstantial evidence charge requested in the *Holland* case, which is essentially the one requested by this petitioner, was one of "the safeguards traditionally provided in the administration of criminal justice".

In further recognition of the narrowness of the application of the ruling in the *Holland* case, the Court said:

> ". . . The complexity of the problem is such that it cannot be met merely by the application of general rules." *Holland*, supra, 348 U. S. at 129.

From the above analysis of the *Holland* decision, petitioners respectfully submit that its ruling was not intended to effectuate a change in the safeguards traditionally provided in the administration of criminal justice excepting as such safeguards apply to a "net worth" tax prosecution. Therefore, petitioner further submits that since the case at bar involves a charge of criminal conspiracy it was clearly erroneous to refuse the

requested charge as to circumstantial evidence on the basis of the *Holland* decision.

Petitioner realizes that not only must there be an error in the charge to the jury but it must also be shown to be a prejudicial error before this Honorable Court will exercise its supervisory powers. The question of whether or not error is prejudicial is not one which is easily answered nor is it one about which there does not exist some considerable disagreement. It is the contention of the Petitioners that the failure to give the requested charge, that circumstanial evidence must be consistent with guilt and utterly inconsistent with any reasonable hypothesis of innocence, was error of a highly prejudicial nature. When one realizes the maze of inferences which may be drawn from circumstantial evidence he must at once become aware of the great possibility of confusion and conjectural thinking on the part of the jury. To assure that a man's life or liberty are not placed in the balance of such unguided thinking the Courts of this nation have seen fit to help guide the jury through the maze. It is from judicial reluctance to see an innocent man convicted that have arisen the rules with regard to circumstantial evidence. The law is well settled that before the evidence is sufficient to be submitted to the jury it must meet the standard test which requires that the jury be reasonably able to find that circumstantial evidence is inconsistent with any other hypothesis than that of guilt.

It is difficult, if not impossible, to determine whether or not the jury in this case did apply the test. It is therefore a distinct possibility that the jury might very well have found that there were reasonable inferences of innocence but because they were unguided they still found a preponderance of evidence pointing to guilt and therefore convicted. Such

a conviction is, as a matter of law, incorrect and should not stand. How is the appellate court to judge this question?

In the case of *Kotteakos v. United States*, 328 *U. S.* 750, 66 *S. Ct.* 1239, 90 *L. Ed.* 1557 (1946) both the majority and the dissenters agreed that there was error in the charge to the jury. The point of disagreement was whether or not the error was prejudicial. Speaking for the majority, in finding that the error was prejudicial, Mr. Justice Rutledge had this to say:

> ". . . Some aids to right judgment may be stated more safely in negative than in affirmative form. Thus it is not the appellate court's function to determine guilt or innocence . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by error . . .
>
> ". . . In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had on the jury's decision . . .
>
> ". . . If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is

from a constitutional norm or a specific command of congress . . . *But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.*" (emphasis ours) *Kotteakos*, supra, pages 763-765.

POINT TWO

PETITIONERS' OBJECTIONS TO THE TRIAL COURT'S OMISSION OF A CHARGE ON CIRCUMSTANTIAL EVIDENCE WERE RAISED IN SUCH A MANNER AS TO COMPLY WITH THE REQUIREMENTS OF RULE 30 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 30 of the Federal Rules of Criminal Procedure, in effect, requires that counsel state clearly the matter to which he objects and set out the grounds upon which his objection is based. However, "Fed. Rules Crim. Proc. rule 30, 18 U. S. C., does not require a lawyer to become a chattering magpie." *United States v. Kelinson*, 205 F. 2d 600, 601 (2d Cir. 1953).

An examination of the record (R. 733-742) discloses that approximately nine pages of the record are devoted to the objections, and exchanges pertaining thereto, which were raised by petitioners with respect to the charge on circumstantial evidence.

"Mr. Douglas:

> Your Honor, may I ask this question; have I a right to assume that in your general charge on circumstantial evidence that you would charge the jury that circumstantial evidence is received with caution by the jury?"

In reply to this, the Court said, in part:

"The Court:

> As I understand the law, the proposition that when circumstantial evidence forms a part or all of the case then that evidence must exclude beyond any and every reasonable hypothesis is no longer the law, and that has been changed in the Fifth Circuit."

Does not the Court's reply clearly point out the fact that the Court was aware of the nature of the objection and was also aware of the charge sought to be obtained by counsel? Later in the exchange Mr. Douglas said:

"Mr. Douglas:

> Well, it is your view that my request–

"The Court:

> It is my view that I should not, and it is not my intention to, charge the jury that when a case is based upon circumstantial evidence, such as this case partly is, that they should receive that caution with–receive that–consider that evidence with great care and caution. Would be error, and I am not going to charge that."

The Court delivered a full and exhaustive oral charge at the conclusion of which, in accordance with Rule 30, supra, the following occurred (R. 769, 770):

> "Mr. Douglas:
>
> > No exceptions to the charge as given; however, I would like to preserve my exception as to the requested charge."

It is the petitioner's contention that the above exchange between Court and counsel served fully to inform the Court of the fact that counsel was requesting a charge that included the rule that circumstantial evidence be inconsistent with any hypothesis except that of guilt; and Petitioners further submit that the Court's own language clearly reflects its understanding of the requested charge. Petitioner admits that in many instances, counsel did not speak with the articularity of a prepared oration, but respectfully urges that mere inadequacies in mode of expression should not be a bar to this petition when in fact they were effective in communicating Petitioners' contentions to the Court. When counsel spoke of the "general charge" it would appear that it was immediately obvious to the Court that he was referring to the charge that had been approved by the Court of Appeals for the Fifth Circuit in *Stutz v. United States*, Point One, supra, since the Court at once, informed counsel that he felt that such a charge was no longer the law.

The pervading question remains. Were the purposes and objectives of Rule 30 fulfilled by Counsel in the trial court? As stated by the Court of Appeals for the 10th Circuit:

> ". . . 'The purpose of the rule is to afford the Judge an opportunity to correct any mistakes which may have

> been made in giving his instructions before the jury retires to consider its verdict.'" *Davis v. United States*, 227 F. 2d 568, 570 (10th Cir. 1955)

Petitioner respectfully urges that the trial judge was afforded an opportunity to correct his mistake before the jury, in the instant case, retired to reach a verdict.

POINT THREE

THE TRIAL COURT'S OMISSION OF THE REQUESTED CIRCUMSTANTIAL EVIDENCE CHARGE WAS SUCH PLAIN ERROR AND AFFECTED SUCH SUBSTANTIAL RIGHTS AS WOULD WARRANT NOTICE OF IT BY THIS COURT, NOTWITHSTANDING A RULING THAT SUCH REQUEST AND OBJECTION TO THE DENIAL THEREOF WERE NOT BROUGHT TO THE ATTENTION OF THE TRIAL JUDGE.

Petitioners respectfully urge that the refusal of the Honorable Trial Judge to charge the jury as requested by counsel for Petitioners was an error which seriously affected the fairness of the proceeding. It is submitted that there was at least a general objection to the refusal to give the requested charge and that such a request has been held sufficient, where error was present, to warrant a review by the appellate court. In *United States v. O'Connor*, 237 F. 2d 466 (2d Cir. 1956) the Government argued that a requested charge to the jury should not be considered on appeal because of a failure to comply with Rule 30 of the Federal Rules of Criminal Procedure. With respect to the Government's argument, the Court said:

> ". . . However, defendant did make a general objection to the trial court's charge' as to the net worth method of computation', and specifically requested the court

> to charge that the establishment of an accurate starting net worth was vital to the Government's case. This request was denied. Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. provides that . . . /page 472/ But in criminal cases federal appellate courts have sometimes noticed errors to which no proper objection has been taken. 'if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' The Federal Rules of Criminal Procedure have not abolished this inherent power. We think that in this case we should consider the charge on the merits, both because the alleged rights of defendant and because, under the circumstances, defendant's general objections and requests were sufficient to preserve this point."

Petitioners submit that the requests for charges made in this case were at least as specific, if not more so, than those in the *O'Connor* case and that the error was just as substantial. In view of that decision it is respectfully requested that the charge in the case at bar be considered on the merits. Petitioners also urge that under the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., the refusal to charge as requested was such plain error as may be noticed although not brought to the attention of the trial court in the proper manner. *O'Connor v. United States*, supra.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

ZACH H. DOUGLAS,
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Jacksonville 2, Florida

Attorney for Cleo E. Lovett,
Petitioner.

PROOF OF SERVICE

I hereby certify that I have made service of 3 copies of the foregoing Petition for Certiorari upon the Solicitor General, Department of Justice, Washington 25, D. C. by depositing same in an envelope so addressed and placing the same in the United States Post Office at Jacksonville, Florida, on the 17th day of May, 1961, with sufficient postage to insure delivery.

ZACH H. DOUGLAS,
505 Lynch Building,
Jacksonville 2, Florida

Attorney for Cleo E. Lovett,
Petitioner.

I further certify that I have also mailed, in due course of mail, a copy of the foregoing petition to Honorable Hartwell Davis, United States Attorney, Middle District of Alabama, and a copy to the Honorable Ira Dement, Assistant United States Attorney for the Middle District of Alabama, on this the 17th day of May, 1961, with postage thereon fully prepaid.

Attorney for Petitioners

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18457

KENNETH WILSON WOOD, WILBUR REEVES, and CLEO E. LOVETT,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Alabama.

(March 17, 1961.)

Before TUTTLE, Chief Judge, and JONES and WISDOM, Circuit Judges.

PER CURIAM: Appellants complain of their conviction of participation in a conspiracy to violate the liquor laws on two principal grounds. The first is that there was a lack of substantial evidence that would tie all of the accused persons into a single conspiracy. The second is that the trial court erred in not charging the jury that in considering circumstantial

evidence they must reject such evidence unless the evidence not only was consistent with the guilt of the accused but was inconsistent with any other hypothesis.

As to the first point we find that there was sufficient evidence that all parties were tied together in a single conspiracy to sustain the jury's verdict.

As to the second point, not only did appellants fail to comply with Rule 30 of the Federal Rules of Criminal Procedure, since they did not request such a charge, but even if they had it would not have been error for the trial court to have refused it. *Holland v. United States*, 348 U. S. 121.

The judgment is AFFIRMED.

APPENDIX "B"

JUDGMENT

Extract from the Minutes of March 17, 1961

KENNETH WILSON WOOD, WILBUR REEVES, and CLEO E. LOVETT,

No. 18457.

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,457

KENNETH WILSON WOOD, WILBUR REEVES and CLEO E. LOVETT,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Alabama

(April 25, 1961)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, JONES and WISDOM, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX "D"

FEDERAL RULES OF CRIMINAL PROCEDURE
RULE 30.

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections."

RULE 30(b).

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

SUPREME COURT, U. S.

JUN 21 1961

JAMES R. BROWNING, Clerk

No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1961

CLEO E. LOVETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BERNARD ROSENBERG,
Attorney,

Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 990

CLEO E. LOVETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 24-25) is reported at 287 F. 2d 810.

JURISDICTION

The judgment of the court of appeals was entered March 17, 1961 (Pet. App. 26). A petition for rehearing was denied on April 25, 1961 (Pet. App. 27). The petition for a writ of certiorari was filed May 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to violate the liquor laws, in which there was direct testimony of a person involved in the illegal operations, it was error for the district court to fail to give a charge that circumstantial evidence must exclude every reasonable hypothesis except that of guilt.

STATEMENT

Petitioner and others were convicted in the United States District Court for the Middle District of Alabama of conspiracy to violate the liquor laws (18 U.S.C. 371). Petitioner was sentenced to imprisonment for three years (R. 794-795). On appeal the conviction was affirmed (Pet. App. 26).

1. The evidence with respect to petitioner may be summarized as follows: One Robert Dale Nettles testified that, from February to June 1959, he worked with others for defendant Wood in the operation of illegal stills (R. 42, 46-47, 74-79, 86-88, 103). After one still in Alabama was raided, Wood, in Nettles' presence, made arrangements with petitioner to set up a still on or near petitioner's land in Georgia (R. 114-115), on which petitioner had said he could set up a pump and meter enclosed by a fence (R. 115). A new electric power pump and meter with an extension of hose to a still were in fact installed on petitioner's land (R. 120-121).[1] Nettles further

[1] Power company records confirmed the fact that a meter had been installed near petitioner's property in Bainbridge, Georgia (R. 220-228). The still was described by investiga-

testified that he hauled whiskey from the still (R. 141, 144) and from petitioner's feed mill, the key to which he had obtained from petitioner himself (R. 142-143). This still was also raided (R. 146). Later, Nettles worked for Wood and petitioner in running another still on land that petitioner was farming (R. 150-151). This third still was raided as well (R. 157).

2. After the district court had denied motions for judgment of acquittal, petitioner's present counsel, who represented Wood at the time, stated that he assumed that the judge would charge the jury that circumstantial evidence was to be received with caution (R. 733). The judge stated that such was not the law and that it was his understanding that it was no longer the rule that the jury should be told that circumstantial evidence had to exclude every "reasonable hypothesis" except guilt (R. 733-734). Although counsel for defendant Reeves had requested a charge on circumstantial evidence embodying the "reasonable hypothesis" theory (R. 784), counsel for Wood (petitioner's present counsel) stated that he understood the case of *Holland* v. *United States*, 348 U.S. 121, as having changed the law as to circumstantial evidence by leaving out the "reasonable hypotheses theory", but that he did not understand it to change the rule that circumstantial evidence should be viewed with caution (R. 734-735). The district judge again stated that he did not regard it as correct

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tors who raided it (R. 471-474, 483-484) and by one who visited it after it had been abandoned (R. 230-237).

that "when a case is based upon circumstantial evidence, such as this case partly is," the jury should be told to consider the circumstantial evidence with caution (R. 735-736). The position of Wood's counsel was adopted by petitioner's trial counsel (see R. 770), but neither could offer case law in support of their view (R. 741-744, 747). After the court's charge, counsel expressed their satisfaction with it but reserved objection to the failure of the court to give their requested charges (R. 769-770).

ARGUMENT

1. Although petitioner seeks to raise the question whether, on the trial of charges other than income tax evasion, the jury must be instructed that circumstantial evidence must exclude every reasonable hypothesis except that of guilt,[2] that question is not really presented by this case at all, for, particularly in relation to petitioner, the case rested basically on the jury's estimate of the credibility of Nettles who *directly* implicated petitioner in the illegal liquor operations. Such circumstantial evidence as there was with respect to petitioner merely tended to confirm the truthfulness of Nettles' testimony.

2. In any event, the ruling in *Holland* v. *United States*, 348 U.S. 121, 139-140, "that where the jury is properly instructed on the standards for reasonable

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[2] There is serious doubt whether this question was properly raised under Rule 30, F. R. Crim. P. (see Pet. App. 25; the Statement, *supra*, pp. 3-4), although this problem is not of moment in view of the other considerations discussed in the text, *infra*.

doubt, * * * an additional instruction on circumstantial evidence is confusing and incorrect," was clearly intended not to be limited to cases of income tax evasion, for the Court noted generally (*id.* at 140) that "[c]ircumstantial evidence * * * is intrinsically no different from testimonial evidence." Moreover, in light of the Court's strictures on the need for care in "net worth" cases (*id.* at 126-130), it seems evident that, had the Court thought that the rule for which petitioner contends was at all useful in clarifying issues for the jury, it certainly would have deemed it applicable in a "net worth" case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JUNE 1961.

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 110

CLEO E. LOVETT,

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versus

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

The Solicitor General
for the United States.

ZACH H. DOUGLAS
Attorney for Petitioner
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In the
Supreme Court of the United States
OCTOBER TERM, 1960

No. 990

CLEO E. LOVETT,

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versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER TO GOVERNMENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

Whether or not counsel for Petitioner compiled with Rule 30 of the Federal Rules of Criminal Procedure in his request that

a charge on circumstantial evidence be given by the trial judge. (Question (2), page 3 of Brief in Chief).

STATUTORY PROVISIONS AND SUPREME COURT RULE INVOLVED

The statute involved is:

Federal Rules of Criminal Procedure, 30, 18 U. S. C. A. (Appendix "B", page 28 of Brief in Chief)

The Supreme Court Rule involved is:

Supreme Court of the United States, Revised Rules, effective July 1, 1954, Rule 41, Briefs on the Merits-Time for filing, paragraph 5, reading as follows:

"Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have included in his brief in chief, he may file forty printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these rules, up to the time the case is called for hearing, or, by leave of court, thereafter."

STATEMENT OF THE CASE

The Petitioner and divers other parties were indicted and convicted of conspiring to violate the Internal Revenue Code. (R-2,775) An appeal of this conviction was taken to the Court of Appeals for the Fifth Circuit. One of the assignments of error upon which that Appeal was grounded was that the trial

court erred in its refusal to give a requested circumstantial evidence charge. The Court of Appeals, in a Per Curiam opinion, affirmed the conviction. The Petitioner's contentions as to the requested circumstantial evidence charge were rejected on two grounds: (1) That Petitioner failed to comply with Rule 30 of the Federal Rules of Criminal Procedure by failing to request the charge and (2) even if the Petitioner had requested the charge the Court would not have been in error in refusing the request. (Appendix "A", page 25, brief in chief).

In Petitioner's brief in chief he has attacked both points of the Court of Appeal's opinion on its affirmance of the trial court's refusal to give the circumstantial evidence charge.

New matter has just come to the attention of counsel for the Petitioner which it is felt will conclusively show that Petitioner had, in legal effect, requested the charge and that the Court of Appeals affirmance on that ground is therefore erroneous. It is the purpose of this supplemental brief to present this newly discovered matter to the Court. Petitioner's arguments as to the other proposition upon which the Court of Appeals relied have been fully covered in the brief in chief.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER DID NOT COMPLY WITH THE FEDERAL RULES OF CRIMINAL PROCEDURE BECAUSE THERE WAS A WRITTEN REQUEST FOR A CIRCUMSTANTIAL EVIDENCE CHARGE WHICH WAS DENIED AND THERE WAS SPECIFIC OBJECTION TO THE DENIAL: BOTH THE DENIAL AND REQUEST BEING MADE UNDER SUCH CIRCUMSTANCES AS TO INURE TO THE BENEFIT OF PETITIONER FOR THE PURPOSE OF APPELLATE REVIEW.

It was the decision of the Court of Appeals that the Petitioner had failed to comply with the Federal Rules of Criminal Procedure by his failure to request the charge on circumstantial evidence and therefore that the Petitioner could not rely upon the refusal to give such a charge as grounds for appeal. More specifically, the Court said:

> "As to the second point, not only did appellants fail to comply with Rule 30 of the Federal Rules of Criminal Procedure, *since they did not request such a charge* . . . ." (Emphasis ours) (Appendix "A", page 24, brief in chief)

It is the contention of the Petitioner that: (1) Such a request was made and that it was made in writing; (2) that upon the trial judge's denial of the requested instruction there was objection to such denial and sufficient grounds stated therefore; (3) that such requests and denials fully compiled with Rule 30 of the Federal Rules of Criminal Procedure; and (4) that such requests and denials were made in behalf of all the co-defendants on trial, including the Petitioner.

Mr. Moore, Attorney for Defendant Wilbur Reeves, presented to the trial judge a written request for an instruction as to circumstantial evidence. Said instruction appears in the record, page 784-785 and reads as follows:

DEFENDANT REEVES' REQUESTED CHARGE

NO. 1.

TITLE OMITTED.)

Where circumstantial evidence is relied upon in a criminal prosecution, proof of a few facts or a multitude of facts all consistent with the supposition of guilt is not sufficient to warrant a verdict of guilty. In order to convict a person upon circumstantial evidence, it is necessary not only that the circumstances all concur to show that the defendant committed the crime and be consistent with the hypothesis of guilt, since that is to be compared with all the facts proved, but that they be inconsistent with any other rational conclusion and exclude every other reasonable theory or hypothesis except guilt. The facts proved must be consistent with each other and with the main fact sought to be proved. A reasonable doubt must be resolved in favor of the defendant where a fact or circumstances is susceptible of two or more interpretations. If the circumstances tending to show the guilt of the defendant are as consistent with his innocence as with his guilt, they are insufficient. In order to convict a person of a crime, the facts must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of defendant's innocence. Great care, however, must be exercised in drawing inferences from circumstances proved in crimi-

nal cases, and mere suspicions will not warrant a conviction.

20 Am. Jur. 1068-1070.

R. WORTH MOORE,
(R. Worth Moore),
Attorney for Wilbur Reeves.

Lewis State Bank Building,
Tallahassee, Florida

Granted: .....

Denied:

FRANK M. JOHNSON, JR.
Judge.

At the close of all the evidence, Mr. Douglas, Attorney for Defendant Wood, addressed the Court:

"Mr. Douglas:

Your Honor, may I ask this question; have I a right to assume that in your general charge on circumstantial evidence that you would charge a jury that circumstantial evidence is received with caution by a jury?" (R-733)

In reply to this, the Court said, in part:

"The Court:

As I understand the law, the proposition that when circumstantial evidence forms a part or all of the case then that evidence must exclude beyond any and every

reasonable hypothesis is no longer the law, and that has been changed in the Fifth Circuit." (R-734)

Later in the exchange, Mr. Douglas said:

"Mr. Douglas:

Well, it is your view that my request--

"The Court:

It is my view that I should not, and it is not my intention to, charge the jury that when a case is based upon circumstantial evidence, such as this case partly is, that they should receive that cautious with--receive that--consider that evidence with great care and caution. Would be error, and I am not going to charge that." (R-735)

After this request for a charge on circumstantial evidence, the denial thereof and the objection to that denial, Mr. Douglas requested various other charges. Then Mr. Moore, Attorney for Defendant Reeves, addressed the Court:

"Mr. Moore:

Mr. Douglas has just answered, I mean asked upon both of these questions, Your Honor. I previously submitted to you written requested instructions."

"The Court:

Yes, I am going to refuse--I am going to refuse all of your written requested instructions. That doesn't mean, of course, that I just-- my answer to your last

question shows that it doesn't mean I won't charge part of that, or considerable part of it." (R-736)

Subsequently, the Court delivered an oral charge to the jury. Before the jury retired to reach their verdict, the following exchange took place:

"The Court:

All right, now, if you will, for the defendant Wood, Mr. Douglas, state your exceptions and objections.

"Mr. Douglas:

No exceptions to the charge as given; however, I would like to preserve my exception to the requested charge.

"The Court:

All right, in that connection, each charge that you requested, and this is as to each defendant requesting, have been refused, either on ground that they are inaccurate statements of the law, or if accurate, covered adequately and fully in the oral charge." (R-769)

Further along in the exchange the Court called on Mr. Lee, Attorney for Petitioner at trial:

"The Court:

Lovett, Ward, and Williams.

"Mr. Lee:

Same situation, Your Honor, no exceptions, and we would adopt the same request that--as was--as was pre-

viously done on the matter mentioned by Mr. Douglas.

"The Court:

I don't know whether I understand what you are talking about or not; *are you objecting to my not giving the requested--written requested charge;* is that what you are-- (emphasis ours)

"Mr. Lee:

That's right, just preserving that, Your Honor, excuse me." (R-770)

Thus, the record shows that counsel for the Petitioner, at trial, objected to the denial of the written requested charge on circumstantial evidence and adopted the grounds stated by Mr. Douglas for the basis of that objection.

It is urged that the written request served fully to inform the Court of the nature of the charge being requested and that the objections and arguments concerning the denial of the request served fully to inform the judge of the import of his overruling the objections.

In a case such as the one at bar, wherein there are several co-defendants, each represented by different counsel, who are indicted and tried simultaneously; it would appear to be both illogical and highly inefficient to require that each counsel parrot the other when a request or an objection has been made to the Court. The folly of requiring such repetition has long been recognized by the Courts. In *Gardner v. United States, Coudrey v. United States,* 230 F. 575 (8 Cir. 1916), the co-defendants were tried and convicted of mail fraud. One of the assignments or error was that the Court erred in refusing

to give a requested instruction. Counsel for only one of the co-defendants had requested the instruction and stated his objection to the denial. The Government contended that only the defendant who had made the request and the objection was entitled to raise it as error on appeal. In reversing the conviction, the Court rejected the Government's contention. The Court said:

> "It is claimed that assignment of error number three, made by the defendant Coudrey, was based upon a request and exception made by Coudrey alone and that the same cannot be invoked in behalf of the defendant Gardner. Under the facts appearing in this record we do not think this so. Gardner and Coudrey were jointly indicted and so tried. They were represented it seems by different counsel. Sometimes counsel for Coudrey would make an objection and take an exception, sometimes counsel for Gardner would do the same. When we come to consider that the object of making objections and taking an exception is to call the attention of the trial court specifically to some point of law that there may be a ruling upon the same in order to have it reviewed in the appellate court, it at once appears that to accomplish the object of the objection and exception it was only necessary that one counsel call the court's attention to it. So far as the real object of making an objection and taking an exception is concerned it would have been idle formality for counsel for each defendant to make the same objection and exception to the same ruling." *Gardner*, supra, 230 F. at 580.

Only one other Federal decision has discussed this point. In *Slade v. United States*, 267 F 2d. 834 (5 Cir. 1959), the *Gardner* case was cited with approval. Petitioner urges that the paucity

of case decision on this point is indicative of the well settled nature of this question.

Petitioner therefore respectfully submits that the Court of Appeals' denial of the written request filed by Mr. Moore and the objections and arguments thereto made by Counsellors Douglas, Moore and Lee, all inure to the benefit of the Petitioner and can be relied upon by him for the purposes of complying with Rule 30 and as grounds upon which to base his appeal and this petition.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Petitioner has fully complied with the Federal Rules of Criminal Procedure and that therefore, the Petition for Writ of Certiorari should be granted.

ZACH H. DOUGLAS,
505 Lynch Building,
Jacksonville 2, Florida
Attorney for Cleo E. Lovett,
Petitioner.

PROOF OF SERVICE

I hereby certify that I have made service of 3 copies of the foregoing supplemental brief for Petition for Certiorari upon Hon. Archibald Cox, the Solicitor General, Department of Justice, Washington 25, D. C. by depositing same in an envelope so addressed and placing the same in the United States Post Office at Jacksonville, Florida, on the 6th day of July, 1961, with sufficient postage to insure delivery.

ZACH H. DOUGLAS,
505 Lynch Building,
Jacksonville 2, Florida
Attorney for Cleo E. Lovett,
Petitioner.

FILED
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Attorney for Petitioner

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PETITION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The appellant above named respectfully petitions this Honorable Court for a rehearing of its petition for writ of certiorari in the above-entitled cause, and in support of this petition represents to the Court as follows:

Reserving our argued position as to each of the points of our petition for certiorari, we petition for rehearing solely upon the grounds of plain error committed below, and not heretofore raised for consideration before this tribunal.

It is the contention of the petitioner that such error below should be noticed by this Court by reason of the following grounds:

(1) The indictment under which the petitioner was convicted of the felony of Conspiracy to Commit Offense or to Defraud the United States, 18 U.S.C.A. 371, and subsequently sentenced to three years' imprisonment, alleged the object of the conspiracy to be the violation of five distinct provisions of the Internal Revenue Code, Title 26. Of the five offenses, one, Section 5008(b), Title 26, I.R.C., is a misdemeanor; the others, Sections 5601, 5606, 5632, and 7206(4), Title 26, I.R.C., are felonies. In view of the present law of conspiracy that the jury need not find the accused guilty of violation of more than one of the offenses for a verdict of guilty, the prejudicial effect of this indictment becomes immediately apparent. Appellant stands in the position of one who is sentenced to a felony even though a substantial possibility exists that in the eyes of the jury he is guilty of a misdemeanor only. He is a man whom the jury may very well have found guilty of a misdemeanor upon the evidence of a felony or felonies; yet, once convicted upon such findings, he is subject to the graver penalty meted properly to a felon.

(2) The Fifth Circuit Court of Appeals discussed the problems arising under 18 U.S.C.A. 371 in the case of *Williams v. United States*, 238 F. 2d 215 (5th Cir. 1956), but failed to render a holding upon the merits of the question, here again presented, due to defendant's failure to preserve the question

on appeal by proper objection below. The petitioner in the instant case admits his similar failure to make proper objection; but submits that to allow the use of an indictment of this nature to go uncorrected, possibly determining thereby whether the accused shall be sentenced to a maximum possible penalty of 30 days imprisonment and a $1000 fine for conviction of a misdemeanor or to the three-year term of imprisonment actually received by the petitioner for the felony of conspiracy, is to commit error constituting a defect affecting substantial rights of petitioner and falling thus within the "plain error" provision of Federal Rule of Criminal Procedure 52(b).

For the foregoing reasons, this petition for rehearing should be granted.

Respectfully submitted by

ZACH H. DOUGLAS
505 Lynch Building
Jacksonville 2, Florida

Attorney for Petitioner

Certificate of Service

I hereby certify that I have served a copy of the foregoing Petition for Rehearing, by mail, to the United States Attorney, Federal Building, Montgomery, Alabama, and a copy to the Solicitor General of the United States, Department of Justice, Washington, D. C. on this 1st day of November, 1961.

Zach H. Douglas